Supreme Court, U.S.
FILED

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NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

JOSE DELGADO GARCIA and SONYA DELGADO,
Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS -- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN; NEW FIRST CITY, TEXAS -- HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK, NATIONAL ASSOCIATION, and GLENN W. TIMMONS,
Respondents

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR PETITIONERS

QUESTIONS PRESENTED

I.

Whether a litigant's right to due process of law under the Fourteenth Amendment to the United States Constitution is violated when a state trial court employs devices unknown and unauthorized under state law to dispose of a lawsuit.

II.

Whether a litigant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution is violated when a federal court of appeals disposes of a case without opinion by placing it on the summary calendar in those instances where the case does not qualify to be placed on the summary calendar under the rules of the particular federal court of appeals.

PARTIES TO THE PROCEEDING

The following is a listing of all parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Jose Delgado Garcia, Plaintiff in the trial court, Appellant in the Court of Appeals, and Petitioner herein.

2. Sonya Delgado, Plaintiff in the trial court, Appellant in the Court of Appeals, and Petitioner herein.

3. First City, Texas -- Houston, N.A. f/k/a First City National Bank of Houston -- McAllen, Defendant in the trial court, Appellee in the Court of Appeals, and predecessor-in-interest of Respondent Texas Commerce Bank, National Association.

4. Glenn W. Timmons, Defendant in the trial court, Appellee in the Court of Appeals, and Respondent herein.

5. Federal Deposit Insurance

Corporation, Appellee in the Court of Appeals, and Respondent herein.

6. New First City, Texas -- Houston, N.A., Appellee in the Court of Appeals, and Respondent herein.

7. Texas Commerce Bank, National Association, Appellee in the Court of Appeals, and Respondent herein.

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OPINIONS BELOW

The trial court, the 370th District Court of Hidalgo County, Texas, conducted a four-day jury trial, and at the close of Plaintiff's case did two things, to-wit: (1) granted a directed verdict in favor of Respondents, and (2) granted a "judgment on the pleadings" in favor of First City, Texas -- Houston, N.A. against Petitioners in the sum of $50,000.00. An appeal in the Texas Thirteenth Court of Appeals was abated when First City, Texas -- Houston, N.A. was declared insolvent, and the Federal Deposit Insurance Corporation removed the lawsuit to The United States District Court For The Southern District of Texas, McAllen Division. The Honorable George P. Kazen entered an order adopting the state court judgment as the judgment of the United

States District Court, and Petitioners appealed to the United States Court of Appeals For The Fifth Circuit, which affirmed without opinion. A Motion For Rehearing was denied by order of the United States Court of Appeals For The Fifth Circuit entered on January 6, 1994.

JURISDICTION

Petitioners seek review of a judgment entered by the United States Court of Appeals For The Fifth Circuit. The date of entry of the judgment was December 9, 1993. Petitioners as Appellants in the Court of Appeals filed a Motion For Rehearing, which was denied by order entered January 6, 1994.

Section 1254(1) of Title 28, United States Code, confers to the United States Supreme Court the jurisdiction to review the judgment by writ of certiorari.

PERTINENT CONSTITUTIONAL, STATUTORY, AND COURT RULE PROVISIONS

A. Fifth Amendment, United States Constitution

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

B. Fourteenth Amendment, United States Constitution

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> . . .[N]or shall any State deprive any person of life, liberty, or property,

without due process of law.

C. Local Rule 47.6 of the United States Court of Appeals For The Fifth Circuit provides as follows:

> **47.6 Affirmance Without Opinion**
> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an

administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders:

"AFFIRMED. See Loc.R.47.6." or "ENFORCED. See Loc.R.47.6."

STATEMENT OF THE CASE

Petitioners filed a lawsuit in the 370th District Court of Hidalgo County, Texas and obtained a temporary restraining order prohibiting the foreclosure of real property. After a trial on temporary injunction, the Honorable Donald W. Allee granted a temporary injunction prohibiting foreclosure upon the real property until final trial. Meanwhile, First City filed a counterclaim for $50,000.00 principal on the note, interest, and attorney's fees.

The case was called for trial before Judge Harry Lewis, a visiting judge. Petitioners presented evidence that (1) First City had financed the purchase of the real property in question by Petitioners from a corporation named Desa Group, Inc.; (2) Petitioners had signed a note for $50,000.00, pledged the real

property in question, and thereafter First City refused to give Petitioners the full $50,000.00; (3) the actions of First City and Timmons had caused damage to Petitioners.

After Petitioners rested, the trial court granted a directed verdict in favor of First City and Timmons. Without hearing any further evidence, the trial court granted First City a "judgment on the pleadings" on the counterclaim for $50,000.00 without requiring First City to put on any evidence and without allowing Petitioners to present any evidence of their affirmative defenses. The only issue that was presented to the jury for consideration was the amount of attorney's fees that should be awarded to First City. After the trial court interrupted and prohibited Petitioners' counsel from

making his final argument to the jury, co-counsel concluded the argument, and the jury responded with an award of "$00.00."

After a Motion For New Trial had been overruled by operation of law, the case was appealed to the Thirteenth Court of Appeals For The State of Texas. That appeal was abated when First City was declared insolvent on or about October 30, 1992, and substitution of the Federal Deposit Insurance Corporation led to removal of the lawsuit on December 4, 1992 to The United States District Court For The Southern District of Texas, McAllen Division, by authority of 12 U.S.C. §1819(b)(2)(B) . The Honorable George P. Kazen entered an order adopting the state court judgment as the judgment of the United States District Court, and the case was appealed to the United States Court of

Appeals For The Fifth Circuit. The United States Court of Appeals For The Fifth Circuit acquired jurisdiction by authority of 28 U.S.C. § 1291.

In their Brief For Appellants to the United States Court of Appeals, Petitioners stated Issue No 2 as follows:

> THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS ON APPELLEE FIRST CITY'S COUNTERCLAIM BECAUSE SUCH ACTION VIOLATED APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW.

Brief For Appellant, p. xv; p.1.

Respondents' trial counsel moved for a judgment on the pleadings, stating:

"YES YOUR HONOR. I'VE GOT A COUNTERCLAIM. AND AT THIS TIME I MOVE FOR JUDGMENT ON THE PLEADINGS IF I MAY."

Statement of Facts, Volume V, p. 632, l. 5-7.

Petitioners' trial counsel preserved an error via objection, stating:

"I'M GOING TO OBJECT TO THIS, YOUR HONOR. I DON'T KNOW UNDER WHAT VEHICLE COUNSEL IS PROCEEDING UNDER. LAST TIME I CHECKED THIS WAS A TRIAL, APPARENTLY I MUST HAVE STEPPED OUT AND STEPPED BACK INTO EITHER A SUMMARY JUDGMENT HEARING OF SOME TYPE."

Statement of Facts, Volume V, p. 634, l. 25 through p. 635 l.4.

The United States Court of Appeals

For The Fifth Circuit, after conducting oral argument, entered an order affirming the judgment of the trial court without written opinion. The order stated: "AFFIRMED. See Loc.R.47.6."

Petitioners filed a Motion For Rehearing and asserted that the case at bar did not fall within any of the four classes of cases specified by Local Rule 47.6 of the United States Court of Appeals For The Fifth Circuit. The Motion For Rehearing was denied by order entered January 6, 1994.

REASONS FOR GRANTING WRIT

I. **A litigant's right to due process of law under the Fourteenth Amendment to the United States Constitution is violated when a trial court employs devices unknown and**

unauthorized under state law to dispose of a lawsuit.

After Petitioners had put on evidence in support of their case-in-chief, Petitioners rested. Thereafter, Respondents were granted a directed verdict on all of Petitioners' claims. Respondents then moved for a "judgment on the pleadings" and sought judgment on the bank's counterclaim for the $50,000.00 allegedly due under the note. Petitioners had pleaded affirmative defenses, including breach of contract, fraud, and homestead. Petitioners advised the trial court after Respondents had moved for "judgment on the pleadings" that affirmative defenses had been pleaded, and that Petitioners were entitled to put on evidence in support of those defenses. Petitioners further pointed out to the

trial court that Respondents had not presented their case-in-chief. Nevertheless, the trial court without hearing any additional evidence granted First City a "judgment on the pleadings" on the face amount of the note in the sum of $50,000.00. Such action by the trial court deprived Petitioners of their day in court to contest their liability on the counterclaim.

In Derbigny v. Bank One, 809 S.W.2d 292, 294 (Tex. App. -- Houston [14th Dist.] 1991, no writ), a trial court after calling a case for trial struck the appellants' amended answer and counterclaim when it had been filed after the pleading deadline. The trial court then proceeded to render judgment for Bank One without hearing evidence. "The court did not grant a summary judgment nor did

it render a default judgment or nihil dicit judgment, since appellants' [sic] filed an answer and appeared for trial." The Fourteenth District Texas Court of Appeals held that such actions violated appellants' right to due process of law.

The Derbingy case further states:

> Fundamental to the concept of due process is the right to be heard. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1984, 32 L.Ed.2d 556 (1972). The right to be heard assures having a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and to have judicial findings based upon that evidence. Id.;

> Turcotte [v. Trevino], 499 S.W.2d at 723. It includes also an opportunity to cross-examine witnesses, to produce witnesses, to be heard on questions of law, and the right to have judgment rendered after trial. 653 S.W.2d at 358. The trial court deprived appellants of this right.

Derbingy v. Bank One, 809 S.W.2d 292, 294-295 (Tex. App. -- Houston [14th Dist.] 1991, no writ).

Like the facts in Derbigny, the case at bar did not involve a summary judgment, nor did it involve a default judgment or a nil dicit judgment. Petitioners appeared at trial and presented evidence in support of their case-in-chief. On the fourth day of trial, and before Respondents had

called a single witness, the trial court granted a "judgment on the pleadings," despite the fact that such a mechanism is unknown under the laws or Rules of Civil Procedure of the State of Texas. Petitioners rightfully believed that they would be given the opportunity to present defensive evidence in support of their pleaded affirmative defenses after First City presented its case-in-chief on its counterclaim. Prior to the granting of the "judgment on the pleadings," Petitioners informed the trial court of their right to present defensive evidence, including want or failure of consideration. Despite such notice, the trial court elected to disallow Petitioners the right to present defensive evidence and grant "judgment on the pleadings."

The case at bar was not a suit on sworn account, where an abbreviated procedure would be authorized under Tex. R. Civ. P. 185. See Brown Foundation v. Friendly Chevrolet Co., 715 S.W.2d 115 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). Instead, the trial court utilized a maneuver without foundation in the Texas Rules of Civil Procedure that in effect violated Petitioners' right to due process of law by depriving Petitioners of a full hearing as well as the ability to present evidence at a meaningful time.

In Creel v. District Attorney For Medina County, Texas, 818 S.W.2d 45, 46 (Tex. 1991), a trial court dismissed an inmate's petition for writ of mandamus without notice or hearing. As such action was not authorized by the laws of Texas, the Texas Supreme Court held that such

actions by the trial court deprived the inmate of his right to due process of law.

Petitioners submit that this case would present an excellent opportunity for the United States Supreme Court to declare without hesitation that when a state court utilizes devices and procedures unknown and unauthorized under its own law to render a judgment, then such actions constitute a violation of due process of law.

II. A litigant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution is violated when a federal court of appeals disposes of a case without opinion by placing it on the summary calendar in those instances where the case does

not qualify to be placed on the summary calendar under the rules of the particular federal court of appeals.

On December 9, 1993, in the case at bar a per curiam opinion was rendered by a panel of the United States Court of Appeals For The Fifth Circuit which stated as follows: "AFFIRMED. See Local Rule 47.6."

Local Rule 47.6 states as follows:

47.6 Affirmance Without Opinion

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based

on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may

> in its discretion enter either of the following orders: "AFFIRMED. See Loc.R.47.6." or "ENFORCED. See Loc.R.47.6."

Local Rule 47.6, United States Court of Appeals For The Fifth Circuit.

The case at bar does not fall within any of the four prongs specified in Local Rule 47.6. The case does not fall within subsection (1) because it was a jury trial, and no findings of fact were made. The case does not fall within subsection (2) because Petitioners were not attacking the sufficiency of the evidence in support of a jury verdict, but instead were attacking the fact that (a) a verdict had been directed and (b) that "judgment on the pleadings" had been granted to Respondents even though such a vehicle is unknown to Texas law. Subsections (3) and

(4) are also inapplicable in that the case did not concern an administrative order or summary judgment, respectively.

As the case at bar does not fall within any of the four prongs authorized by Local Rule 47.6, Petitioners respectfully submit that the United States Court of Appeals For The Fifth Circuit erred in utilizing Local Rule 47.6 for disposition of the case.

In National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d 966, 972 (5th Cir.1970), Chief Judge John R. Brown stated as follows:

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the

factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons id the thing out of which law -- and particularly Judge-made law -- grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. All Judges know that in some cases this latter factor may almost

completely transcend the importance of the case which is the vehicle bringing the questions forward.

"By Rule 21 [a predecessor rule substantially similar to Local Rule 47.6] the Court not only implicitly assumes the responsibility for evaluating this factor, but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value. Having to make unanimously that determination, and implicitly, the further one that circumstances or factors, other than precedential value, do not make an opinion essential or appropriate, the Court, by

adoption of the Rule, affirms that it must be carefully and selectively employed.

"The Court recognizes that it must -- the word is must -- never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d at 972.

National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d at 971-72, states that one of its numbered subdivisions must apply before

Rule 21 can be invoked. By the very terms of Local Rule 47.6, the case must fall into one of the four categories before said rule can be applied.

The right of access to the courts is protected by the right to due process of law, i.e., the opportunity to access the courts must be at a meaningful time and in a meaningful manner. Matter of N.C. Trading, 586 F.2d 221 (C.C.P.A.1978).

A fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The right to due process of law under the Fifth Amendment to the United States Constitution is applicable to the judicial branch of government. In re New York, N.H. & H.R. Co., 289 F.Supp 451

(D.C.Conn.1968).

Thus, as the United States Court of Appeals For The Fifth Circuit erroneously utilized Local Rule 47.6 to dispose of this case, this case should be reversed and remanded for further proceedings including the issuance of an opinion of the panel outlining its reasons for affirmance or reversal.

CONCLUSION

For the reasons stated herein, the United States Supreme Court should grant the Petition For Writ of Certiorari and reverse and remand the judgment of the court below.

Respectfully submitted,

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ATTORNEY OF RECORD FOR PETITIONERS JOSE DELGADO GARCIA AND SONYA DELGADO

CERTIFICATE OF SERVICE

I, PATRICIA ALVAREZ, a member of the Bar of the Supreme Court of the United States and counsel of record for Jose Delgado Garcia and Sonya Delgado, Petitioners herein, hereby certify that, pursuant to Rule 29.3, Rules of the Supreme Court, I served three copies of the foregoing Petitioner For Writ of Certiorari on each of the parties herein, as follows:

On Federal Deposit Insurance Corporation, Receiver For First City, Texas -- Houston, N.A. f/k/a First City

National Bank of Houston -- McAllen, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On New First City, Texas -- Houston, N.A., by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On Texas Commerce Bank, National Association, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the

post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On Glenn W. Timmons, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Edmundo O. Ramirez, 901 Texas Commerce Bank -- Neuhaus Tower, McAllen, Texas 78501.

All parties required to be served have been served.

Dated April 6, 1994.

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ATTORNEY OF RECORD FOR PETITIONERS JOSE DELGADO GARCIA AND SONYA DELGADO

NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

JOSE DELGADO GARCIA and SONYA DELGADO,
Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS -- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN; NEW FIRST CITY, TEXAS-- HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK, NATIONAL ASSOCIATION, and GLENN W. TIMMONS,
Respondents

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

APPENDIX

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COUNSEL OF RECORD FOR PETITIONERS

CAUSE NO. C-539-90-G

JOSE DELGADO GARCIA and SONYA DELGADO, Plaintiffs	§	IN THE DISTRICT COURT
VS.	§	HIDALGO COUNTY, TEXAS
FIRST CITY, TEXAS-- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN and GLENN TIMMONS, Defendants	§	370TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 27th day of April, 1992, came on to be heard the above-numbered and styled cause wherein Jose Delgado Garcia and Sonya Delgado are Plaintiffs and Cross-Defendants and First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston-McAllen and Glenn Timmons are Defendants and First City, Texas-Houston, N.A. is a Cross-Plaintiff, and came all parties in person and by and through their attorneys of record and

announced ready for trial; and a jury of twelve persons having been selected, and the Plaintiffs and Cross-Defendant having presented their evidence; and the Defendants, First City, Texas-Houston, N.A. and Glenn Timmons having presented to the Court their Motion for Directed Verdict; and the Court being of the opinion that said motion should be granted; and having directed a verdict;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs, Jose Delgado Garcia and Sonya Delgado, take nothing against the Defendants, First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston-McAllen and Glenn Timmons;

And First City, Texas-Houston, N.A. as Cross-Plaintiff having presented its evidence; and the Court being of the opinion that said Cross-Plaintiff, First

City, Texas-Houston, N.A. is entitled to judgment thereon as herein provided;

IT IS ORDERED, ADJUDGED AND DECREED that Cross-Plaintiff, First City, Texas-Houston, N.A., have and recover judgment in the amount of $50,000.00 together with interest thereon from the date of this Judgment until paid at the rate of ten percent (10.00%) per annum, compounded annually as allowed by law.

All costs of court are adjudged against and shall be paid by Jose Delgado Garcia and Sonya Delgado.

All writs and process for the enforcement and collection of this Judgment and the costs of court may issue as necessary.

All relief requested by any party hereto and not specifically granted is denied.

SIGNED this 4th day of May, 1992.

/s/ Harry Lewis
JUDGE PRESIDING

Hon. Kelly K. McKinnis, 1630 N. 10th, McAllen, Texas 78501
Hon. Edmundo O. Ramirez, 901 First City Bank Tower, McAllen, Texas 78501.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

JOSE DELGADO	**§**	
GARCIA and	**§**	
SONYA DELGADO	**§**	
	§	
V.	**§**	**CIVIL ACTION**
	§	**NO. M-92-230**
FEDERAL DEPOSIT	**§**	
INSURANCE CORP.	**§**	
as Receiver for First	**§**	
City, Texas - Houston,N.	**§**	
A. and GLENN W. TIMMONS	**§**	

AGREED ORDER ADOPTING STATE COURT JUDGMENT

On the 2d day of December, 1993, it came to the Court's attention that under the rationale of two recent decisions of the 5th Circuit Court of Appeals, **5300 Memorial Investors, Ltd. v. RTC**, 973 F.2d 1160 (5th Cir. 1992) and **FDIC v. Kahlil Zoom-In Markets**, 978 F.2d. 183 (5th Cir. 1992), this court should adopt the state court judgment entered in Cause No. C-539-90-G. It is therefore ORDERED that the

Judgment signed on May 4, 1992, and entered in Cause No. C-539-90-G in the 370th District Court of Hidalgo County, Texas is ORDERED entered as the Judgment of this Court.

SIGNED this 2d day of December, 1993.

/s/ George P. Kazen
HONORABLE ----------
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

/s/ Deborah J. Greer by Kelly K. McKinnis by permission
Deborah J. Greer
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CO-COUNSEL FOR APPELLEES NEW FIRST CITY, TEXAS - HOUSTON, N.A., AND ITS TRANSFEREE TEXAS COMMERCE BANK NATIONAL ASSOCIATION, and GLENN W. TIMMONS

AGREED TO:

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ATTORNEY IN CHARGE OF APPEAL FOR APPELLANTS JOSE DELGADO GARCIA AND SONYA DELGADO

U.S. COURT OF APPEALS
FILED

DEC 09 1993

CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7244

JOSE DELGADO GARCIA and
SONYA DELGADO,

Plaintiffs-
Appellants

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver for First City, Texas - Houston, N.A. formerly known as First City National Bank of Houston - McAllen, ET AL.,

Defendants-
Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA-M-92-230)

Before GOLDBERG, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Local Rule 47.6.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

U.S. COURT
OF APPEALS
FILED
JAN 06 1994
CHARLES R.
FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7244

JOSE DELGADO GARCIA and
SONYA DELGADO,

Plaintiffs-
Appellants

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for First City, Texas -
Houston, N.A. formerly known as First City
National Bank of Houston - McAllen, ET
AL.,

Defendants-
Appellees.

Appeal from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING

(JANUARY 6, 1994)

Before GOLDBERG, JOLLY, and BARKSDALE,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/Rhesa S. Barksdale
United States
Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

93-1591

Supreme Court, U.S.
FILED
MAY 6 1994
OFFICE OF THE CLERK

NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

JOSE DELGADO GARCIA and SONYA DELGADO,

Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS-HOUSTON, N.A. F/K/A/ FIRST CITY NATIONAL BANK OF HOUSTON-McALLEN; NEW FIRST CITY, TEXAS-HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK NATIONAL ASSOCIATION, and GLENN W. TIMMONS,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR
RESPONDENT TEXAS COMMERCE
BANK NATIONAL ASSOCIATION

NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

JOSE DELGADO GARCIA and SONYA DELGADO,

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V.

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BANK NATIONAL ASSOCIATION

QUESTIONS PRESENTED

Respondent disagrees with the assertion of Petitioners that the state trial court employed devices unknown and unauthorized under state law to dispose of a lawsuit; therefore, Respondent disagrees that a constitutional issue involving the Fourteenth Amendment to the United States Constitution is presented.

Similarly, Respondent disagrees with the statement of Petitioners that this case did not qualify to be placed on the summary calendar under the rules of the federal court of appeals; therefore, Respondent does not believe that Petitioner's second question is fairly presented under the facts of this case.

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OPINIONS BELOW

The statement of Petitioner as to opinions below is substantially correct except insofar as it infers that the judgment in favor of First City, Texas - Houston, N.A. against Petitioners in the sum of $50,000 was a judgment on anything other than the evidence presented.

STATEMENT OF THE CASE

Petitioners as Plaintiffs filed this lawsuit in the 370th District Court of Hidalgo County, Texas, claiming damages from the Defendants named therein by reason of the Defendants' alleged violations of the Texas Deceptive Trade Practices Act, fraud, breach of contract, and intentional and negligent infliction of emotional harm. The Defendant, First City, Texas - Houston, N.A. (sometimes referred herein as "First City"), counterclaimed for indebtedness owing by Plaintiffs to that Defendant represented by a $50,000 note. Plaintiffs claimed on appeal that they pleaded affirmative defenses of failure of consideration, breach of contract, fraud and homestead. Breach of contract and fraud were also

pleaded by Plaintiffs as causes of action against Defendants.

The case went to trial on the merits. Plaintiffs presented their evidence over a span of four days and rested. The evidence did not show that First City refused to give Plaintiffs the full $50,000. To the contrary, the evidence conclusively showed that Plaintiffs had received the entire $50,000, this by Plaintiffs' own admission from the stand, and that none of the $50,000 had been repaid.

Plaintiffs during the four-day jury trial offered evidence in support of their alleged causes of action against, among others, First City. After Plaintiffs rested, the trial court heard Defendants' motions for judgment: (1) that the Plaintiffs having failed to

offer legally sufficient evidence in support of their alleged causes of action take nothing as to such alleged causes of action; and (2) that the evidence offered showing conclusively that Plaintiffs had received the $50,000 agreed to be loaned them and not having repaid same that First City recover the principal sum of $50,000 loaned by it to Plaintiffs. The court gave Plaintiffs full opportunity to present to the court both by way of argument and further evidence why the court should not grant such motions of First City; however, Petitioners elected to stand upon their record which included evidence admitting execution of the note held by First City and of receiving the consideration for such note. First City did not seek foreclosure nor did the judgment order same.

In Petitioner's Statement of the Case, Petitioners quote Respondent's trial counsel as stating, "Yes, Your Honor. I've got a counterclaim. And at this time I move for judgment on the pleadings if I may." There was more to this statement than quoted. It continued in this manner: "The pleadings on behalf of Mr. Delgado and the testimony from Mr. Delgado and the testimony from Mr. Timmons, there is no question that he received the $50,000. So I move for judgment on the $50,000. There is a judicial admission in their pleadings in their Plaintiff's First Amended Petition that the only thing that Mr. Delgado paid was two interest payments...." [Statement of Facts, Volume V, page 632, lines 7-13].

The court responded: "Well, what you're asking a judgment on at this time, does the evidence before the court include that? Verify and prove that." [Statement of Facts, Volume V, page 632, lines 23-25]. The court went on and said: "I'm trying to ask you if there was any evidence before the court that your judgment against the Plaintiff should be satisfied?" [Statement of Facts, Volume V, page 633, lines 2-4]. Counsel for the Respondents answered, "Yes, Your Honor, there is plenty of evidence...." [Statement of Facts, Volume V, page 633, lines 5-6]. There was other discussion between the court and counsel for the Respondents regarding the nature of the evidence including Respondent's claim of judicial admission in the pleadings after which, Petitioner's trial counsel made

the objection quoted in its Petition for Writ of Certiorari (page 5). On several occasions the court stated that the court was going to let counsel for the Petitioners tell the court why the motion for judgment for $50,000 should not be granted. After more argument, the court finally said, "All right. Anything else?" [Statement of Facts, Volume V, page 639, line 4] to which counsel for Petitioners responded, "We stand on our previous arguments...." and after which the court then said, "Nothing further offered, the defense motion on their cross-action for the amount of the note, original amount of the note, $50,000 is granted, only. Anything else?" [Statement of Facts, Volume V, page 639, lines 14-18]. The trial proceeded before

the jury on the question of attorney's fees.

SUMMARY OF ARGUMENT

The trial court did not employ devices unknown and unauthorized under state law to dispose of a lawsuit. The motions for judgment were recognized by counsel and the court as such; and counsel for Petitioners had been accorded opportunity to go forward with the evidence if they desired to do so. In short, Petitioners were not denied the opportunity to fully develop their case. The fact is, they had already done so.

Neither were Petitioners denied due process when the Fifth Circuit Court of Appeals declined to write an opinion. The Fifth Circuit followed its rule finding that the judgment of the district court was based on findings of facts

which were not clearly erroneous. However, for purposes of argument, even if the Fifth Circuit did not strictly follow its rule, such failure did not result in denial of due process to Petitioners. Petitioners were accorded full opportunity to present their appeal, and they did so. The judgment was one of affirmance. Failure to write an opinion did not deny Petitioners any further right to seek reconsideration or prosecute this writ.

ARGUMENT

The standards of due process applicable to this case are clearly stated in *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) wherein it is stated that parties whose rights are to be affected are entitled to be heard, and that this opportunity to be

heard must be granted at a meaningful time and in a meaningful manner. The complaint of Petitioners is that their opportunity to be heard was not conducted in a meaningful manner.

Petitioners were Plaintiffs in the trial court. They presented their evidence in support of their claims under the Texas Deceptive Trade Practices Act, their claims that Respondents acted fraudulently, their claims that there was a breach of contract, and their claims that the Respondents inflicted emotional harm upon them. In doing so, they also presented evidence of their indebtedness, acknowledged their receipt of all funds, acknowledged their non-payment of principal and that the principal indebtedness was past due and unpaid. They now complain that at the close of

their presentation of evidence, Respondents moved for and the court granted motions for judgment that the Plaintiffs take nothing on their asserted causes of action, and, the indebtedness having been fully proven and the evidence showing that Plaintiffs had no valid defenses thereto, that Defendants recover their principal.

What the attorney for the Defendants called his motion is not important. Texas courts look to substance and not to form. *State Bar of Texas v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980); *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex. App. -- Dallas 1991, writ denied). The basis for the judgment requested was clearly stated and it was based on more than just the pleadings. It was based on testimony of named witnesses and the other evidence

presented. Counsel for Plaintiffs should not and were not misled. Certainly, the court was not.

Petitioners have not shown that the court at any time refused a proffer of evidence on any subject, claim or affirmative defense. In fact, the record shows that the court offered Petitioners every opportunity both by way of argument and additional offer of evidence but that Petitioners declined. Petitioners have not shown that at any time during the proceedings any offer of additional evidence relating to defenses was offered, much less, refused.

Considering the affirmative defenses, it is understandable why the Plaintiffs did not make an additional offer. Plaintiffs themselves had testified to the contract, to its

acceptance, to the acceptance of the monies, and to the non-repayment of those monies. They had disproved by their own evidence that there was any affirmative defense based on breach of contract or failure of consideration. The only affirmative defense which might have been offered was rendered irrelevant. The defense of homestead would apply only if Respondents sought to enforce a lien against the claimed homestead property. They did not.

In short, it is impossible to see how Plaintiffs can claim to have been denied a full and fair hearing of both their claims and defenses.

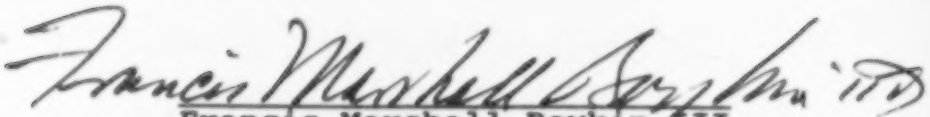
The state trial court held as a matter of law that under the evidence presented there was no issue to go to the jury except for attorney's fees. That

issue was presented to the jury and the jury found against Respondents. Respondents have not complained of that finding. This seems to clearly meet one of the criteria required by Local Rule 47.6 of the United States Court of Appeals for the Fifth Circuit. It appears clear that the Court of Appeals deemed the judgment of the district court to be based on findings of fact which were not clearly erroneous. Even so, Petitioners were not denied a fundamental right of due process. They had a full and fair hearing both at the trial and on appeal. It was meaningful in time and manner and, therefore, did not deny the Petitioners any fundamental right of due process.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied. The United States Court of Appeals did not so far depart from accepted and usual course of judicial proceedings, nor did it sanction such a departure by the lower court as would result in denial of due process to Petitioners or as would call for an exercise of this Court's power of supervision. The Court of Appeals correctly held the findings of fact and conclusions of law of the trial court were not clearly erroneous and in doing so upheld a decision in which Petitioners were accorded the full measure of due process owing them.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Francis Marshall Boykin III, a member of the Bar of the Supreme Court of the United States and counsel of record for Texas Commerce Bank National Association, Respondent herein, hereby certifies that, pursuant to Rule 29.3, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On Jose Delgado Garcia and Sonya Delgado, Petitioners herein, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Patricia Alvarez, One

Park Plaza, Suite 510, 100 E. Savannah, McAllen, Texas 78503; (210) 971-9446.

On Federal Deposit Insurance Corporation, Receiver for First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston - McAllen, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Chris Bellotto, Federal Deposit Insurance Corporation, 550 17th Street N.W., Room 4018, Washington, D.C. 20429; (202) 898-7274.

On Glenn W. Timmons, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Edmundo O. Ramirez, 901 Texas

Commerce Bank, Neuhaus Tower, McAllen, Texas 78501; (210) 682-2440.

New First City, Texas - Houston, N.A. is not a party hereto, Texas Commerce Bank National Association having been substituted therefor in the Court of Appeals.

All parties required to be served have been served.

Signed this 6th day of May, 1994.

Francis Marshall Boykin III

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Supreme Court, U.S
FILED
JUN 7 1994
OFFICE OF THE CLERK

No. 93-1591

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSE DELGADO GARCIA AND SONYA DELGADO,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR FIRST CITY, TEXAS—HOUSTON, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether the trial court denied petitioners due process by directing a verdict in favor of respondents.

2. Whether the decision of the court of appeals should be reversed because the court of appeals did not write an opinion explaining its decision to affirm the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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FEDERAL DEPOSIT INSURANCE CORPORATION AS
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N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A9-A10) is unreported, but the judgment is noted at 12 F.3d 209 (Table). The order of the district court adopting the judgment of the state court (Pet. App. A6-A8) and the judgment of the state court (Pet. App. A2-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1993. A petition for rehearing was denied on

January 6, 1994. Pet. App. A11-A12. The petition for a writ of certiorari was filed on April 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 22, 1988, petitioners executed a promissory note payable to First City National Bank of Houston, in the original principal amount of $50,000, as well as a deed of trust securing repayment of the note. After determining that petitioners were in default under the note, First City posted the collateral for foreclosure. Petitioners responded by filing suit in a Texas state court claiming breach of contract, violations of the Texas Deceptive Trade Practices Act, fraud, and intentional and negligent infliction of emotional distress. First City counterclaimed to recover the $50,000 due on the note. Petitioners then asserted defenses of failure of consideration, unclean hands, waiver, equitable estoppel, breach of contract, fraud, and business homestead. See Plaintiffs' First Amended Original Petition; Counterclaim of Defendant First City; Cross-Defendants' First Amended Original Answer.

2. At a jury trial, petitioners produced the note, identified their signatures on it, testified that they received the full $50,000 from First City, and conceded making just two small interest payments and no principal payments to First City. See Pet. 1-2; Resp. C.A. Br. 10-11.

At the close of petitioners' evidence, First City made an oral motion for a directed verdict, initially styled a "judgment on the pleadings" or "judgment on the $50,000," as to petitioners' affirmative claims and First City's counterclaim. V Statement of Facts 632. First City argued that the evidence presented by petitioners

not only failed to prove petitioners' affirmative claims or affirmative defenses, but established First City's counterclaim by admitting that petitioners had received the money represented by the note and had not repaid it. *Id.* at 632-634. Petitioners objected, arguing that First City improperly was seeking a "summary judgment hearing of some type." *Id.* at 635. The court stated: "There was no summary hearing that I know about," and allowed First City to proceed. *Ibid.*

First City then reiterated its view that the proof included an admission that petitioners had received the $50,000 and argued that petitioners' failure to plead a defense of payment entitled First City to judgment on the note. V Statement of Facts 635. Petitioners in turn argued that they had pleaded a defense of failure of consideration. *Ibid.* First City responded that the plea of failure of consideration was conclusively rebutted by the evidence establishing that petitioners had received the entire balance of the note. *Id.* at 636. At that point, the court indicated that it would "let [petitioners] tell the court in [their] view of [*sic*] why [First City's] motion for a judgment for $50,000 shouldn't be granted." *Ibid.* Petitioners reiterated their reliance on the plea of failure of consideration, and argued that First City had not adequately made out its case. Petitioners' counsel concluded by stating: "He needs to make his case, but if he didn't want to, why, we'll stand on our evidence as it is." *Id.* at 637.

After satisfying itself that First City was seeking a judgment only for the $50,000 of which petitioners had acknowledged receipt (and not for interest or attorney fees), the court offered petitioners another opportunity to proceed. V Statement of Facts 637-639. Petitioners' counsel again stated: "Your honor, we stand on our previous arguments." *Id.* at 639. The court then granted

First City's motion, stating: "Nothing further offered, the defense motion on their cross-action for the amount of the note, original amount of the note, $50,000 is granted." *Ibid.*

The court entered a final judgment on May 4, 1992, in which it characterized First City's motion as a "Motion for Directed Verdict," ordered that petitioners take nothing on their claims, and entered judgment in favor of First City in the amount of $50,000. Pet. App. A2-A5. On August 2, 1992, petitioners filed an appeal with Texas's Court of Appeals for the Thirteenth District, located in Corpus Christi, Texas. Pet. C.A. App. Tab 5.

3. On October 30, 1992, the Comptroller of the Currency declared First City insolvent and appointed the Federal Deposit Insurance Corporation as receiver. That same day, the receiver transferred the note petitioners had executed to New First City, Texas—Houston, N.A. When that institution subsequently failed, the note was transferred to respondent Texas Commerce Bank, N.A. On December 4, 1992, the receiver removed this case to the United States District Court for the Southern District of Texas. See Resp. C.A. Br. 4-5; Pet. C.A. App. Tab 8.

4. On December 2, 1993, the district court adopted the state court judgment as its own. Pet. App. A6-A8 (citing *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160 (5th Cir. 1992)).[1]

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[1] In the *5300 Memorial* case, the Fifth Circuit held that a federal district court to which a case is removed from state court should "take the state judgment as it finds it." 973 F.2d at 1162. In a case already on appeal in the state courts before removal, the federal district court should "prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Ibid.*

5. The court of appeals affirmed without opinion. Pet. App. A9-A10.

ARGUMENT

1. Petitioners first argue (Pet. 6-13) that the state trial court deprived them of due process by "employ[ing] devices unknown and unauthorized under state law" (Pet. 6-7). The state court's procedures, however, were entirely appropriate under Texas law. To be sure, it was not appropriate for First City to rely on evidence petitioners had introduced at trial to support a motion for a judgment on the pleadings. But it was entirely appropriate for the state court to treat the motion as a motion for an instructed or directed verdict under Tex. R. Civ. P. 268. See Tex. R. Civ. P. 71 ("Misnomer of Pleading: When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated."); see *State Bar of Texas* v. *Heard*, 603 S.W.2d 829, 833 (Tex. 1980) ("We look to the substance of a plea for relief to determine the nature of a pleading, not merely at the form of title given to it."). Petitioners offer no reason for supposing that the Due Process Clause prohibits a practice of evaluating motions based on their substance rather than the name by which counsel describes them.

Nor did the trial court act improperly in treating the motion in this case as a motion for an instructed verdict. The motion was made after petitioners completed presentation of their case. It relied on evidence introduced in petitioners' presentation to support First City's contention that the record, viewed in light of

applicable principles of Texas law,[2] conclusively established First City's right to judgment on its counterclaim. Furthermore, the trial court repeatedly gave petitioners' counsel an opportunity to rebut the legal argument made by First City. When petitioners could do nothing except rely on a defense that the trial court apparently found legally insufficient, it was appropriate for the trial court to grant judgment for First City rather than continue with the trial. See *Oldham* v. *Thomas*, 864 S.W.2d 121, 125 (Tex. Ct. App.—Houston 1993) (discussing standard for directed verdict under Texas law), writ of error granted (Apr. 20, 1994).

2. Petitioners also contend (Pet. 13-22) that the court of appeals denied them due process by disposing of the case without issuance of an opinion, arguing that the case does not fit the criteria for summary disposition articulated in Fifth Circuit Rule 47.6. That contention is frivolous. Among other things, that rule permits affirmance without opinion where "the evidence in support of a jury verdict is not insufficient." 5th Cir. R. 47.6(2). An interpretation of the rule to preclude summary disposition in cases where a trial court directs a verdict would serve no purpose. Appellate courts

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[2] First City relied on Tex. R. Civ. P. 95, which provides that a party must make a specific plea of payment if it wishes to defend against a suit on a note by arguing that it already has repaid the note. Because petitioners had not made such a plea, and because they had introduced the note itself into evidence and had acknowledged that they had signed the note and received the principal balance described in it, First City argued that Texas law mandated a judgment in its favor. See Tex. Bus. & Com. Code § 3.307(b) (Vernon 1968) (holder of note entitled to judgment if maker admits signatures and holder produces instrument, unless maker establishes defense). The petition does not challenge that interpretation of Texas substantive law.

frequently conclude that a trial court correctly determined that the evidence warranted a directed verdict; the fact-specific nature of such a determination makes it likely that in many cases appellate affirmance of such a disposition will establish no legal principles of general importance.

In any event, whatever the merits of the court of appeals' interpretation of its own local rule, it is completely implausible to suppose that the failure of the court of appeals to issue an opinion denied petitioners due process. The courts of appeals "have wide latitude in their decisions of whether * * * to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Given petitioners' failure to articulate any basis for doubting the correctness of the decision of the court of appeals, there is no reason to believe that the summary nature of the disposition prejudiced petitioners in any way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994